**BEFORE THE NEW ZEALAND**
**TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2022/03**

**COMPLAINTS ASSESSMENT COMMITTEE**
**Prosecutor**

V

[redacted]
**Respondent**

| | |
|---|---|
| Hearing: | 20 September 2022 |
| Appearances: | RW Belcher & OJ Cann for CAC |
| | No appearance by or for Respondent |
| Decision: | 31 October 2022 |
| | (re-released 13 December 2022, after a recall of publication aspect of decision, and receiving an application to set aside the 31 October findings) |
| Tribunal: | T Mackenzie, N Parsons, N Coe |

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# DECISION OF THE TRIBUNAL ON LIABILITY, PENALTY, RECALL, PUBLICATION, COSTS AND SETTING ASIDE APPLICATION

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## Introduction

[1] The CAC charges [redacted] with Serious Misconduct under section 401 of the Education Act 1989. The particulars of the charge are:

> The CAC charges that [redacted], registered teacher, of [redacted], between 1 January 2019 and 16 December 2019, did:
>
> a. Have an inappropriate relationship that breached professional boundaries, including having a sexual relationship, with a 17 year-old- student (Student A) at the School;
>
> b. Supply Student A with alcohol and cigarettes.

[2] The CAC says that the alleged conduct breaches Rules 9(1)(e)(i),(ii), and (k) of the Teaching Council Rules 2016.

## Recall of publication decision

[3] The Tribunal initially released its decision in this matter on 31 October 2022. [redacted] non publication application was declined in that decision. Subsequently the CAC raised with the Tribunal that we had omitted to consider their submission that publication of [redacted] name may lead to identification of student A. The CAC asked the Tribunal to recall that aspect of its decision.

[4] The Tribunal considers that the grounds for recall of that aspect of the decision are made out. The Tribunal has now considered this aspect of the publication orders and has now determined the issue, as can be seen later in this decision. The new portion of the publication decision is italicised.

[5] Separately, [redacted] has informally raised with the Tribunal that she believes she was not afforded an opportunity to defend these charges, and appears to wish to do so. We will address the issues she has raised as an addendum to this decision.

[6] Finally, the Tribunal has also taken this opportunity to address and determine costs. The costs section of this decision has now been updated to reflect this.

[7] We note for clarity that the balance of the decision remains the same as issued on 31 October 2022.

## Proceedings

[8] Several attempts have been made by the CAC and the Tribunal Administrator to involve [redacted] in these proceedings.

[9] Whilst there were some initial informal responses, no formal engagement has occurred and responses are no longer forthcoming. The initial responses however denied all of the allegations.

[10] After reviewing the various witness statements, the Tribunal indicated that it only needed to hear from the complainant. He will be referred to as A.

[11] An electronic hearing was conducted on 20 September 2022 where A's evidence was led and the Tribunal had the opportunity to ask A further questions.

[12] The Tribunal notes that despite the absence of [redacted], the charges must still be proven. The standard is the balance of probabilities. We have taken into account that [redacted] denies the facts and charge.

**Evidence**

[13] Having seen and heard A, it was clear to us that he was uncomfortable relaying the details and was reluctant to be involved. This was consistent with some of the peripheral evidence, where there had been an initial denial of the allegations. We consider that there was clearly a level of shame or embarrassment as the allegation became known by family and senior school staff. This is not unexpected given the nature of the allegation and if anything we consider is realistic and supports it.

[14] Ultimately however the case really comes down to whether we accept the evidence of A. A was led through his brief of evidence and answered various further questions of counsel and the Tribunal. A was clear and consistent and showed no signs of trying too hard or making things up, and we note that he made concessions where due in [redacted] favour (for instance he was unsure about who sent the first messages on Instagram).

[15] We accept the evidence of A as truthful. We consider that the CAC submissions adequately summarise the evidence of A and it is convenient to repeat them here:

> 1. The respondent, [redacted], is a registered teacher who, between 2014 and 2019, taught at (a school). She was employed as a day-to-day reliever and in fixed term roles as [redacted] teacher.
>
> 2. In 2019, [redacted] occasionally taught the student in this matter, A, when she was the relief-teacher for his Year 12 class.
>
> 3. A's evidence is that, during 2019, he and [redacted] shared flirty jokes with each other before messaging over social media about meeting with each other outside of the school. Over a period of two to three months in 2019, [redacted] provided alcohol to A on one occasion, and cigarettes on at least five occasions. Following this, [redacted] and A had sex in her car at least three times. A was 17 years old and a Year 12 student at the time.

[16] We also note that the alcohol provided was tequila, to A when he was at a

party with other young persons.

**Discussion – liability**

[17] Having accepted the evidence of A, it is inevitable that a charge of Serious Misconduct is made out where a teacher has a sexual relationship with a student, provides alcohol, and provides tobacco.

[18] We consider that all three conduct limbs of section 378(1)(a) of the Act apply. The conduct was likely to adversely affect A (and indeed it did). It reflects adversely on [redacted] fitness. And it may bring the profession into disrepute.

[19] We also consider that s 378(1)(b) is made out. The conduct breached professional boundaries (rule 9(1)(e)(i)&(ii)), and was an act or omission that brings or is likely to bring the profession into disrepute (rule 9(1)(k)).

**Penalty principles**

[20] Section 404 of the Act provides:

> **404 Powers of Disciplinary Tribunal**
>
> (1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:
>
> (a) any of the things that the Complaints Assessment Committee could have done under section 401(2):
>
> (b) censure the teacher:
>
> (c) impose conditions on the teacher's practising certificate or authority for a specified period:
>
> (d) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:
>
> (e) annotate the register or the list of authorised persons in a specified manner:
>
> (f) impose a fine on the teacher not exceeding $3,000:
>
> (g) order that the teacher's registration or authority or practising certificate be cancelled:
>
> (h) require any party to the hearing to pay costs to any other party:
>
> (i) require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:
>
> (j) direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.

[21] In *CAC v McMillan* this Tribunal summarised the role of disciplinary

proceedings in this profession as: [1]

> … to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.

[22] The primary motivation is to ensure that three overlapping purposes are met. These are:

I. to protect the public through the provision of a safe learning environment for students;

II. to maintain professional standards; and

III. to maintain the public's confidence in the profession.[2]

[23] The Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[3]

[24] The Act provides for a range of different penalty options, giving this Tribunal the ability to tailor an outcome to meet the requirements that a proven case presents. Penalties can range from taking no steps, to cancellation of a teacher's registration.

[25] In *CAC v Fuli-Makaua* this Tribunal has noted that cancellation may be required in two overlapping situations:[4]

> a) Where the conduct is sufficiently serious that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession; and
>
> b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. Therefore, there is an apparent ongoing risk that leaves no option but to deregister.

**Penalty discussion**

[26] There is little that need be traversed given the seriousness of the conduct.

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[1] *CAC v McMillan* NZTDT 2016/52, 23 January 2017, (at [23]).

[2] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.

[3] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

[4] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 (at [27]).

[27] Sexual relationships with students are at the upper end of the serious misconduct cases that come before the Tribunal.

[28] Although there is no presumption, it would be a rare situation where a teacher, found liable for such, could persuade the Tribunal that cancellation was not required. Moreover where the conduct included provision of (strong) alcohol and tobacco.

[29] We consider that a censure and cancellation is the appropriate outcome.

[30] We order:

- That [redacted] registration be cancelled.[5]
- That [redacted] be censured.[6]

**Publication**

[31] By email of 7 June 2022 [redacted] asked for her name not to be published. This was on the basis of "protection of (her) children". A second reason was that a new career and employer would be "affected negatively".

[32] In a Minute of 7 September 2022, emailed to [redacted], the Tribunal continued interim non publication orders. The Tribunal stated:

> [1] This Minute confirms the continuation of an order for interim non publication of the respondent's name.
>
> [2] In making that interim order, the Tribunal notes however the current paucity of the material advanced by the respondent via her application/email of 7 June 2022. The respondent needs to be aware of the relatively high threshold for permanent orders and may wish to take advice and/or advance further argument and evidence.

[33] Subsequently no further information or evidence has been received from [redacted] to advance the application, and as noted there was no engagement in the substantive hearing of the charges.

**Publication – principles**

[34] The default position under s 405 of the Act is that Tribunal hearings are to be conducted in public. Consequently the names of teachers who are the subject of these proceedings are to be published. The Tribunal can only make one or more of the orders for non-publication specified in the section if we are of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and to the public interest.

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[5] Section 404(1)(g).

[6] Section 404(1)(b).

[35] The purposes underlying the principle of open justice are well settled. As the Tribunal said in *CAC v McMillan*, the presumption of open reporting "exists regardless of any need to protect the public".[7] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In *NZTDT v Teacher* the Tribunal described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[8]

[36] In *CAC v Finch* the Tribunal noted that the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context. As such, the Tribunal confirmed that while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to place a gloss on the term "proper" that imports the standard that must be met in the criminal context.[9]

[37] In *Finch,* the Tribunal described a two-step approach to name suppression that mirrors that used in other disciplinary contexts. The first step, which is a threshold question, requires deliberative judgment on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply means that there must be an "appreciable" or "real" risk.[10] In deciding whether there is a real risk, the Tribunal must come to a judicial decision on the evidence before it. This does not impose a persuasive burden on the party seeking suppression. If so satisfied, the Tribunal must determine whether it is proper for the presumption to be displaced. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[11]

[38] In NZTDT 2016/27, we acknowledged what the Court of Appeal said in *Y v Attorney-General*.[12] While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".[13]

[39] The Court of Appeal in *Y* referred to its decision *X v Standards Committee (No*

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[7] *CAC v McMillan* NZTDT 2016/52.
[8] *NZTDT v Teacher* 2016/27,26.
[9] *CAC v Finch* NZTDT 2016/11, at [14] to [18].
[10] Consistent with the approach we took in *CAC v Teacher* NZTDT 2016/68, at [46], we have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.
[11] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].
[12] *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911, [2016] NZAR 1512, (2016) 23 PRNZ 452.
[13] At [32].

*1) of the New Zealand Law Society*, where the Court had stated:[14]

> The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in *Rowley*.

[40] Gwynn J in the High Court recently considered the applicable principles for suppression in professional disciplinary litigation, in a Chartered Accountant's disciplinary decision.[15] Although the specific statutory wording in that legislation used the term "appropriate" (instead of "proper"), we consider little turns on such semantics and the observations of the Court are of application here. Gwynn J stated:

> [85] Publication decisions in disciplinary cases are inevitably fact-specific, requiring the weighing of the public interest with the particular interests of any person in the context of the facts of the case under review. There is not a single universally applicable threshold. The degree of impact on the interests of any person required to make non-publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error). Nonetheless, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high.
>
> [86] I do not consider the use of the word "appropriate" in r 13.62 adds content to the test usually applied in the civil jurisdiction or sets a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.
>
> (Citations omitted).

**Publication – discussion**

[41] [redacted] *seeks non publication orders. In some cases before us there have been non publication orders predicated upon concerns for children, other family members, or new careers. The difficulty with [redacted] application however is that we have been provided with no real information or evidence to consider. The argument made by the respondent (which itself is a generous description) is conclusory in nature, lacking any specifics. On its merits, the application would not be granted.*

[42] *However, and fortunately for [redacted], publication of her name might lead to identification of the respondent. We accept the CAC's submissions, and the evidence of A, that this is a real concern for him. We note that cases such as this often attract media attention, and indeed this case already has.*

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[14] *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].
[15] *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

[43] *We consider that the grounds are made out on this basis to make a final order for non-publication of [redacted] name.*

[44] *We also consider it in the interests of A that non publication orders now be made permanent so as to not identify him. That is both in his interest and is proper in the wider public interest, to ensure school students are not intimidated from speaking out due to the fear of publicity.*

[45] *The final publication orders will be:*

- *The interim order prohibiting publication of [redacted] name is now made permanent.*
- *There will be a final order prohibiting publication of:*
  - *The names of any students, ex-students, staff or ex-staff mentioned in the evidence or decision, including A.*
  - *The name of the school.*
  - *The district that the school is located in.*

[46] *For the avoidance of doubt, the fact that it was a Christian school can be referred to.*

**Costs**

[47] It is appropriate that [redacted] be ordered to pay a contribution to the reasonably incurred costs that her conduct has caused the profession to incur.

[48] The CAC has indicated in its costs memorandum of 31 October 2022 that it seeks costs 50% of the following costs:

| **Complaints Assessment Committee Costs** | **Amount** |
|---|---|
| Costs of Complaints Assessment Committee (GST exclusive) | $1,618.94 |
| Legal costs and disbursements for Tribunal proceedings (GST exclusive) | $17,160.30 |
| **TOTAL COSTS** | **$18,779.24** |
| **TOTAL COSTS SOUGHT (50%)** | **$9,389.62** |

[49] The Tribunal considers that [redacted] should pay 50% of the reasonably incurred costs of the CAC. However, that does not mean 50% of any amount of costs is to be ordered.

[50] In our earlier decision, we had queried the level of costs and sought further submissions. We would consider that costs as at 31 October 2022 were greater than we would ordinarily see for a matter of this type. However, since that time further costs have probably been incurred. Rather than incorporate those and then seek to determine reasonable costs, we will take a "swings and roundabouts" approach and determine the costs award based on the present figures. We consider that 50% should be ordered, as per the table above.

[51] Tribunal costs are at least $1455. 50% is $727.50. We order this amount.

**Addendum – response from [redacted] to Tribunal's decision of 31 October 2022**

[52] We will now deal with the correspondence received from [redacted] following the Tribunal's initial decision of 31 October 2022 being issued.

[53] That decision was distributed to [redacted] by email on 1 November 2022. On 2 November 2022 [redacted] emailed the Tribunal Administrator and stated:

> Kia ora,
>
> Can you please advise me of to whom I am to email a response to this decision, as my previous attempt to communicate responses have been disregarded.
>
> My multiple attempts to communicate during this matter regarding my availabilty due to work and family commitments have been ignored. The information that has been recorded in this report is false and upsetting.
>
> Once I have been provided with a direct line of communication for this matter, I will respond as soon as possible.
>
> Regards
>
> [redacted]

[54] The Tribunal Administrator responded on 2 November 2022:

> Kia ora [redacted],
>
> Thank you for your email.
>
> You can send your response through to me at dt@teachingcouncil.nz
>
> Please also CC in Mr Belcher and Ms Cann, who act for the CAC, in your response.
>
> Ngā mihi

[55] On 9 November 2022 [redacted] responded:

> Kiaora.
>
> As I have stated previously through this matter, I am employed in a role in which I work

night shift. I work 70 hours a week, and must sleep during regular business hours. This has made involvement with this process difficult. I would like it noted that initially I was contacted via phone, my contact details have not changed, and I have previously stated that I am available to be contacted. I am unsure as to why I have not been contacted further via phone, and earlier this year I specifically requested an opportunity to be contacted, as I received an email that requested I should comment on some part of the email, but I was unsure what I was being asked to comment on. I received no response to this.

I feel that my requests to be contacted have been ignored and that I have not been given a reasonable opportunity to respond to these allegations, and my circumstances have not been taken into account regarding my availability to engage with this process.

When I first was made aware of these allegations, my response was edited in the correspondence that followed.

As I have stated, every allegation against me in this matter is false. When I was first contacted on social media by students using false accounts, in an attempt to blackmail me, I went to the school for help. I received none. I do not know what the students aim was in this, but they did threaten to spread rumours about me. I know nothing more about this as i did not respond at all and deleted that account. I can only assume that this is the result of whatever their intentions were.

I am dismayed that rumours and lies from a group of students have lead to this.

I have asked for protection for my children through non-publication of my details in this matter for the folowing reasons:
My children live in the same community as this school. My eldest attended the school and still has friends that currently attend the school. By publishing my details, my children will be easily identified as our community is small, which would cause them to lose friends and suffer socially. This is not acceptable. As my son is a former student of this school, he must be protected the same as all other former students of the school. I believe it is unjust to publish my details, and identify my children in this matter, if not only for the reason that the matter is based on rumours and lies, but also because they should not be affected in any way by the choices of alchol and drug infused ideas of other students.
If my details are published, my young children will be affected socially and mentally. As my elsldest has already experienced bullying in his new school, and is currently working with a therapist to help him overcome the social anexiety and mental trauma associated with being bullied, it would be detremental to his social and mental well being to risk exposing him to further social and mental anguish. Every step must be taken to protect my children, physically, emotionally, mentally and socialy.

As I have also previously stated, I have worked very hard to find a new career, in which I am successful and happy. As soon as this matter was brought to my attention by the Teachers Council, I was horrified that students would make up such disturbing allegations against any person, and it was at that moment that I did not wish to pursue my career in teaching, as I felt threatened, alone and thought I was not making a difference. I am at a loss to understand why they would do this. Given the openess of the students at the school to discuss their regular drug and alcohol use, I can only assume that this played a factor in their decisions. I do not drink or use drugs myself, so I do not understand the effects that this can have on a person.
As I am a leader in my workplace and industry, publication of my details in relation to this matter would adversley affect the business of my employer. It is unjust to do this

> based on false allegations. This would negatively affect the livelihood of myself and my colleagues, through damage to the reputation of my employers company.
>
> Again, I would like to state that I am available to be contacted via phone after 5pm Sunday to Thursdays. My contact details are unchanged.
> I am also possibly available for an in person meeting on Fridays (this will need to be planned in advance).
> I have been contactable throughout this process, I have simply not been contacted.
> I ask that you contact me for any further information you wish to receive.
> Regards,
>
> [redacted].
> *[sic]*

[56] The Tribunal then issued a Minute on 9 November 2022, discussing the above correspondence (and the separate issue of publication recall). The Tribunal stated, in part:

> [5] I ask that the CAC provide a chronological summary of all contact that was had with [redacted] by the CAC, both before and after the charge was filed and served. It would be helpful if that could be provided within three working days. The Tribunal administrator will also compile a summary of contact had/received with [redacted], which will be circulated for any comment.
>
> [6] [redacted] can then respond to that and/or provide her own account of contact, within a further three working days.
>
> [7] Once all of that is to hand the Tribunal will determine whether substantive submissions or evidence are required, in order to consider the application.

[57] On 14 November 2022 the CAC filed and served a comprehensive timeline. [redacted] has not responded to that, nor to the Tribunal's Minute above.

[58] Having now considered the record of correspondence, and noting [redacted] lack of further response, the Tribunal will now proceed to determine the issue.

[59] Although not framed as such, what [redacted] raises is essentially an application to set aside our decision.

[60] We take guidance from the procedural provisions for similar applications in criminal and civil law. In the criminal law, section 125 Criminal Procedure Act 2011 provides:

> (7) The court may order a retrial of the charge if—
>
> (a) the court is satisfied that—
>
> (i) the defendant was notified of the trial and had a reasonable excuse for non-attendance at the trial, but that reasonable excuse was not known to the court at the time of the trial; and

(ii) it is in the interests of justice; or

(b) regardless of whether the defendant had a reasonable excuse for non-attendance, the court is satisfied that the defendant had a defence that would have had a reasonable prospect of success if he or she had attended the trial.

(8) Despite subsection (7), the court must order a retrial if satisfied that the defendant was not notified of the trial.

[61] In civil law, Rule 15.10 High Court Rules provides:

> 15.10 Judgment may be set aside or varied
>
> Any judgment obtained by default under rule 15.7, 15.8, or 15.9 may be set aside or varied by the court on such terms as it thinks just, if it appears to the court that there has been, or may have been, a miscarriage of justice.

[62] The criminal rule above is essentially a more particular version of the civil rule, although both search for the same test.

[63] We note first that this is not a case, or at least there is no sufficient evidence, that ███ did not receive relevant correspondence and hearing dates. Her email address was consistently used by the CAC (and Tribunal), and ███ in response. That has been occurring now for nearly three years (through the CAC investigation, CAC process and Tribunal proceedings).

[64] ███ was served with the charge by email and notified of the first conference date of 8 March 2022. ███ did not attend that (telephone) conference. The Chair noted in a Minute of that date that it was not clear if ███ knew of the proceeding. Personal service was directed.

[65] Subsequently the CAC notified the Tribunal that ███ had engaged with the CAC. ███ had emailed the CAC counsel on 14 March 2022 and advised that she had received various material from them, worked night shift, and would be slow to respond.

[66] On 30 March 2022 the Tribunal noted to the parties that personal service was no longer required. The Tribunal noted the professional obligation on ███ to engage in the proceedings. A further conference was set down for 10 May 2022.

[67] On 21 April 2022 ███ emailed the Tribunal and stated that she is not available for a PHC. She stated, “I can however provide responses via email to the conference, as this will be the most effective way to enable dialogue between us.”

[68] In a subsequent Minute of that date, the Tribunal noted:

> 2. This matter was last before the Tribunal at a pre-hearing conference on Tuesday, 8 March 2022 (see Minute). Following that conference, on 30 March

2022 I indicated that the direction I had made requiring personal service and the filing of an affidavit of service was no longer required given that had acknowledged to Counsel for the PHC that she had received the relevant documents. professional obligation to engage with these proceedings and make herself available for a future pre-hearing conference or have someone attend on her behalf, was noted at that time.

3. A further pre-hearing conference was held today. Despite having been notified of the conference, she did not attend (either personally or through a representative). Counsel for the CAC confirmed she had had no contact with and the Tribunal Coordinator confirmed she had not heard anything from her.

4. I set the charge down for a hearing to be held in Christchurch commencing on **Tuesday, 20 September 2022 through to and including Thursday, 22 September 2022**.

[69] Subsequently had various email discussions with the Tribunal Administrator, mostly around applying for non-publication. This was followed by a series of correspondence and procedural motions. The CAC noted that they had had no response from regarding an agreed bundle. Briefs were filed and served. Submissions were fled and served.

[70] On 5 September 2022 emailed the Tribunal Administrator as follows:

> Dear Olivia.
> As previously stated, I am employed to work nightshift, which does not enable me to commit to meetings during business hours.
> As I have also stated, I am available to engage in discussion via email, however I have not received any acknowledgement of this. My responses may also be delayed due to my work and family commitments as these take priority over checking emails.
> Kind regards,

[71] On 7 September 2022 counsel for the CAC responded:

> Good afternoon ,
> We refer to your email below.
> As we understand it, you deny that the conduct, alleged in the notice of charge and set out in the summary of facts, occurred. In those circumstances, the CAC must prove its case against you before the Tribunal. As such, the Tribunal made timetabling directions on 10 May 2022 and communicated those directions to you. The CAC has complied with those directions (or sought amendments where appropriate), including filing its evidence and responding to your application for non-publication.
> It is apparent that you were aware of those directions as you filed an application for nonpublication in accordance with them. Aside from that application, we have not received any other communication or documentation from you since those directions were made.
> As you will be aware, this matter is set down for hearing on **20 September 2022 in Christchurch**.

> It will proceed on that date with or without your engagement. As the prosecutors in this matter, it is not for us to assist you with your defence. However, should you now wish to engage in the proceedings, you should immediately advise the Tribunal at dt@teachingcouncil.nz and copy us in. The Tribunal will be able to provide you with any additional information that you require.

[72] Four different Minutes also issued through September regarding hearing methods and dates. A Notice of Hearing, recording the hearing date, was also sent on 13 September 2022. All of this was emailed to [redacted].

[73] On 13 September 2022 [redacted] emailed the Tribunal Administrator as follows:

> Good morning.
>
> I was just Cc-in an email regarding the case against me with the CAC that suggested I was asked to provide comment on a matter.
> I do not appear to be receiving all the information/emails regarding this matter as I am still unaware of what I was asked to comment on.
> This process appears very poorly organised, as any information I have provided the council with so far on this matter has been edited or not reported in the few emails I have received.
>
> Could you provide me with details on what I was asked to comment on so I have the chance to do so.
>
> Kind regards,
> [redacted]

[74] The Administrator responded on that date:

> Kia ora [redacted],
>
> Thank you for your email.
>
> My previous email was referring to the bundle of documents that was filed by the CAC in preparation for the hearing that is taking place next week, 20 September.
>
> I have CC'd in the CAC lawyers who you may have been in touch with previously. I suggest that you get in touch with Mr Belcher and/or Ms Cann to discuss any concerns you have.
>
> Please let me know if I can be of any further assistance.
>
> Ngā mihi

[75] Apart from what has been noted above, there appears to have been no further contact from [redacted]. Of most note is that she did not object to the hearing date and did not seek to adjourn it to another more suitable date (or time).

[76] Despite the lack of engagement from [redacted], the Tribunal still conducted

a hearing on 20 September 2022 and heard directly from A. The Tribunal was aware of [redacted] position – that A was not telling the truth – and ensured that it heard from A and questioned him to enable a thorough assessment. It was clear from the surrounding evidence, and his own evidence, that he was reluctant to be involved. We have noted the same in our substantive decision on the charges.

[77] Turning then to consider all of that against this application. The first ground appears to be that [redacted] was not aware of the hearing. In the context of a professional tribunal, it will be difficult for a respondent to demonstrate that they were not aware of or informed of the hearing. There is an obligation on professionals to engage in disciplinary matters.

[78] This is not a case where the information was not actually received. Rather, we consider that [redacted] has simply not placed sufficient weight or importance on dealing with the charges against her. She is variously too busy or simply doesn't engage. Even now, the Tribunal is told by [redacted] that any contact should be by phone, after 5 pm, Sunday to Thursday, and that she could possibly attend a hearing on a Friday. Whilst we can sympathize with work commitments, this proceeding has been around for a long time, and involves allegations at the higher end of what a teacher might be accused of. It required significantly more regard than [redacted] paid it. Indeed even now, after raising this issue, [redacted] has again not engaged with the Tribunal since the Minute of 9 November 2022, despite a reminder email being sent from the Tribunal Administrator on 21 November 2022.

[79] We also would struggle to accept that a qualified secondary teacher would not have understood what was occurring – i.e. a hearing on the charge. The charge and the notice of hearing were quite clear, as was the miscellany of other correspondence. Further, the Tribunal Administrator and counsel for the CAC were consistently available to assist with any further required information.

[80] It may also be [redacted] argument that she was not given a reasonable chance to attend the hearing. We cannot accept that. The hearing date was mooted in April 2022 and there was no real and good faith attempt by [redacted] to positively communicate whether that date did or didn't suit her and what would instead suit her. Instead the overall theme from the handful of engagements from [redacted] is that very little suited her. We make the same point again then as made above – [redacted] did not afford this proceeding the importance that it required. It ill behoves a professional to fail to actively participate in their disciplinary proceeding, and then complain later that there was no reasonable opportunity given to participate.

[81] On the evidence then, we do not consider that [redacted] has a reasonable excuse for not attending the hearing of these charges.

[82] We also do not think that a re-hearing of the charges is in the interests of

justice. A has already given evidence personally to the Tribunal. And, the evidence concerns a sexual relationship with a teacher. This makes it a particularly high threshold for us to find that a re-hearing should occur. Further, the facts of this matter are now quite aged. Finality is important. In all of those circumstances, we do not see it as at all in the interests of justice to require A to give evidence over again.

[83] Finally, for completeness we comment on the prospects of a successful defence. That is difficult to comment on in any forensic detail, without having seen and heard and any challenges she would make to A. We note however that the challenge appears to be a claim that A has told untruths. There appears to also be a vague hint of "students" blackmailing as well. Aside from that, has not advanced anything further in any real detail which may support her defence, such as cogent evidence which may go to a motive to lie, or to reduce credibility, or to reduce reliability. On its face the defence is a bare assertion and little more, and has already been taken into account when hearing and considering the evidence. Whilst cases can often come down to a contest of credibility, we simply note that it is not a particularly strong sounding defence, especially given the surrounding evidence of previous consistent statements that is available.[16] In any event however the application fails on the issues considered earlier.

[84] To conclude, we decline to set aside our decision. The decision finding serious misconduct, and the penalties above, stands.

[85] The Tribunal proceedings are now at an end. is reminded of her right to appeal the decision to the District Court if she wishes to challenge this decision.

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**T J Mackenzie**

**Deputy Chair**

[16] We have not discussed those in detail in the liability decision given the lack of challenge to A, so that they were not particularly relevant at that stage.